

**UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT**

BAP No. EP 97-089

IN RE: FRANK J. ADAM

**FRANK J. ADAM,
Appellant,**

v.

**UNITED STATES OF AMERICA,
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE,
Appellee.**

**Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. James B. Haines, Jr., Bankruptcy Judge)**

Before

QUEENAN, HILLMAN and VAUGHN, Bankruptcy Judges

David A. King, Bath, ME, on brief for Appellant

Jay P. McCloskey, United States Attorney, and Frederick C. Emery, Jr., Assistant United States Attorney, Portland, ME, on brief for Appellee

June 2, 1998

VAUGHN, B.J.

Frank J. Adam ("Debtor"), a Chapter 13 debtor in Maine, objected on or about August 7, 1997, to a Proof of Claim timely filed by the United States of America ("IRS") against him on December 6, 1996. The IRS, empowered by the Debtor's breach of its Offer in Compromise ("OIC") executed pre-petition on April 15, 1994, filed a Proof of Claim for the full amount of the Debtor's original liability under the OIC as of the petition date, \$74,917.25, plus a civil assessment for unpaid trust fund employment taxes for 1995.¹

The Debtor asseverates the OIC remains effective because he never breached the compromise by failing to pay taxes. In addition, the Debtor claims that paragraph 7(d) of the OIC does not cover "civil penalties."² On appeal, the IRS responds that the OIC required that the Debtor and his company, with the Debtor as the responsible party, file and pay taxes for five years following the agreement. Further, the Debtor breached the agreement when (1) Frank's Old Volks Home, Inc. failed to pay employment taxes for the first quarter of 1995, and (2) the Debtor, as the responsible party, failed to pay the December 14,

¹ The Proof of Claim asserted a secured claim of \$8,048.84, an unsecured priority claim of \$43,728.42, and a general unsecured claim of \$34,138.67, for a total of \$85,915.93.

² At the hearing before Judge Haines on September 17, 1997, the Debtor characterized the civil assessment for unpaid trust fund employment taxes for 1995 as a "civil penalty." (Tr. at 8.)

1995 civil assessment.

By bench order on September 17, 1997, the Bankruptcy Court for the District of Maine ("Bankruptcy Court") rejected the Debtor's defense and overruled the Debtor's objection to the IRS's Proof of Claim.³ Frank J. Adam has appealed, and we affirm.

I. Appellate Jurisdiction

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 158(a) and (c), and Rule 8001-1(d)(1) of the Local Rules for the Bankruptcy Appellate Panel for the First Circuit. 28 U.S.C. §§ 158(a) and (c) (1988 & Supp. 1998); 1st Cir. BAP R. 8001-1(d)(1) (1998). The parties, pursuant to Rule 8001-1, have not elected to have their appeal heard by the District Court for the District of Maine. 1st Cir. BAP R. 8001-1(d)(1). Further, this proceeding, to determine the validity of the IRS's proof of claim, constitutes a separate proceeding within the context of the Debtor's bankruptcy case, and thus is appropriate for review. Smith v. Seaside Lanes (In re Moody), 825 F.2d 81, 85 (5th Cir. 1987).

³ The IRS also moved to dismiss the Debtor's Chapter 13 case, since the Debtor's Chapter 13 plan would have collapsed under the allowed \$85,915.93 IRS Proof of Claim. The Bankruptcy Court, after overruling the Debtor's objection, granted the Debtor's oral motion requesting a ten-day stay pending appeal on the dismissal motion.

II. Background

A. The underlying facts

Certain facts are not in dispute. On June 13, 1996, the Debtor filed his bankruptcy petition under Chapter 13 of the Bankruptcy Code. On December 6, 1996, the IRS filed a Proof of Claim for \$85,915.93, which represented unpaid taxes, penalties and interest dating from 1989. (IRS Proof of Claim, Exh. 4.) The Debtor objected to the IRS's Proof of Claim on August 8, 1997, and in defense submitted the first page of an Offer in Compromise⁴ dated April 15, 1994, between the IRS and the Debtor.

At the time the OIC was executed, the Debtor operated his business, Frank's Old Volks Home, as a sole proprietorship ("d/b/a"). Shortly after he executed the OIC, the Debtor incorporated Frank's Old Volks Home. This Court notes that the Debtor remained the sole owner and operator of Frank's Old Volks Home, Inc., which retained the same tax identification number, 01-0430224, as the d/b/a. This Court also notes that the Debtor addressed the OIC with both his own name and his company's name, but signed the OIC with his name only, the proper method for a d/b/a. Neither party opposed these facts in this appeal or before the Bankruptcy Court.

On or about September 14, 1994, the Debtor paid the IRS

⁴ The Bankruptcy Court based its decision on the entire OIC, which was later filed as part of the IRS's response to the Debtor's objection.

\$13,000 in compromise for unpaid federal employment and unemployment taxes from 1988 through 1992, and the IRS released its liens. However, this contemporaneous exchange did not consummate the Debtor's obligations under the OIC. Paragraph 7(d) of the OIC states: "I/we will comply with all provisions of the Internal Revenue Code relative to my/our returns and paying my/our required taxes for five (5) years from the date the IRS accepts the offer." (Offer in Compromise, ¶ 7(d), Exh. 2.)

Certain alleged defaults under the continuing obligations in paragraph 7(d) of the OIC form the basis of this appeal. Frank's Old Volks Home, Inc. failed to pay federal employment taxes to the IRS for the first and fourth quarters of 1995. Under the "responsible person" provision of 26 U.S.C. section 6672, the IRS assessed the Debtor personally in excess of \$7,000 with a "trust fund recovery." See generally 26 U.S.C. § 6672 (1982 & Supp. 1998) (provision relating to persons who fail to collect and pay over taxes). To date, the Debtor has not paid this assessment.

B. The Bankruptcy Court's decision

The Debtor averred in Bankruptcy Court that the "trust fund recovery" assessment was a penalty, not a tax. (Tr. at 8.) Therefore, the Debtor alleged that the OIC was still in effect because paragraph 7(d) did not require payment of penalties, only the filing of returns and concomitant payment of taxes by the

Debtor. The Bankruptcy Court found that the "civil assessment [for the first quarter of 1995], which is an alternative method of collecting the tax for which the debtor is responsible personally as the responsible party[,] is a tax within the meaning of subparagraph D." (Tr. at 8.) The Bankruptcy Court found on the facts of this case that the mere incorporation of the Debtor's business was an insufficient shield from liability under the OIC. (Tr. at 8.)

II. Standard of Review

Contrary to the Debtor's position that the Bankruptcy Court erred as a matter of law, we review the Bankruptcy Court's decision under the clearly erroneous standard. See FED. R. CIV. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985); Johnson v. Watts Regulator Co., 63 F.3d 1129, 1138 (1st Cir. 1995). After reviewing the transcript, this Court finds that the basis of the Bankruptcy Court's decision rested on the facts which formed the OIC.

III. Discussion

A. A company by any other name . . .

The Bankruptcy Court's decision withstands the clearly erroneous standard. First, the Bankruptcy Court found that the Debtor agreed, both personally and for his company, Frank Old

Volks Home, to abide under the terms of the OIC. (Tr. at 8.) The Bankruptcy Court based its decision on the Debtor's own submission that he remained the sole owner and operator of the company, which retained the same tax identification number and name⁵ after the incorporation. In its bench order, the Bankruptcy Court ruled that the Debtor could not use the newly incorporated status of his company to shield his liability under the OIC: "[t]he Debtor agreed both for himself and for the d.b.a. under the employer identification number set forth on the offer and compromise to pay the taxes under subparagraph 7D." (Tr. at 8.) We will not reverse the Bankruptcy Court's factual finding that the later "Inc." form of the Debtor's company did not, under the ink of the OIC, relieve the Debtor's liability for himself. See Johnson, 63 F.3d at 1135 (fact-driven conclusions reversible only for clear error).

B. Or an assessment

Second, we agree with the Bankruptcy Court that the OIC covers what alternately has been referred to as the "trust fund recovery" or "civil assessment." This Court notes that the genesis of the OIC was the failure to pay the trust fund

⁵ The Court notes that the Debtor retained essentially the same name for his company, since the d/b/a was "Frank's Old Volks Home" and the incorporated name was "Frank's Old Volks Home, Inc."

employment taxes from 1988 to 1992. In addition, section 6671 of Title 26 states that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter." § 6672. See Spivak v. United States, 254 F. Supp. 517 (S.D.N.Y. 1966) (The Court factually found that "[t]he penalty sought by the government in its counterclaim [under section 6672] is in respect of the taxes claimed. . . ."), aff'd, 370 F.2d 612 (2nd Cir. 1967) ("[C]ompromise of a claim . . . cannot serve to release the responsible persons from their direct liability under the statute."), cert. denied, 387 U.S. 908 (1967).

The Debtor, on appeal, payed out a line of argument that, under paragraph 7(d) of the OIC, his failure to pay taxes was not "willful." See § 6672 ("Any person required to collect, truthfully account for, and pay over any tax imposed by this title who willfully fails to collect such tax, or truthfully account for and pay over such tax . . . shall . . . be liable . . ."). However, his contention is "all sail and no anchor." Letter from Thomas Babington, Lord Macaulay, to H.S. Randall (May 23, 1857). The Bankruptcy Court made no finding that paragraph 7(d) necessarily reflected or had embedded in it a willful standard parallel to section 6672 of the Internal Revenue Code. (Tr. at 8.) Instead, the Bankruptcy Court concluded that the civil assessment was, indeed, a tax. (Tr. at 8.)

C. Does not absolve the Debtor's liability.

We see no reason to upset the Bankruptcy Court's findings, particularly in light of United States v. Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. 2106 (1996) ("CF & I"). CF & I was, at the time, the latest descendant in a line of cases whose ancestral history reveals that, when the Bankruptcy Code does not specifically refer to a section of the Internal Revenue Code,⁶ it is for the bankruptcy court to determine whether a particular exaction is a tax or penalty. Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. at 2111-16 (citing United States v. Sotelo, 436 U.S. 268, 275 (1978) ("We . . . cannot agree with the Court of Appeals that the 'penalty' language of Internal Revenue Code § 6672 is dispositive of the status of respondent's debt under Bankruptcy Act § 17(a)(1)(e)[.]").⁷

⁶ The Supreme Court noted that the Bankruptcy Code provides no definition for either "tax" or "penalty," see 11 U.S.C. § 101 (1988 & Supp. 1998), although it specifically references other federal statutes. Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. at 2111 (observing, for example, that section 101(41)(C)(i) references section 414(d) of the Internal Revenue Code).

⁷ CF & I also cites City of New York v. Fiering, 313 U.S. 283, 285 (1941), in which the Supreme Court stated, in deciding that a particular exaction was a tax, that "[section] 64 extends to those pecuniary burdens laid upon individuals or their property . . . for the purpose of defraying the expenses of government or of undertakings authorized by it[.]" Reorganized CF & I Fabricators of Utah, Inc., 116 S. Ct. at 2113 (citing City of New York v. Fiering, 313 U.S. 283, 285 (1941)). This Court notes that, at the hearing held on April 22, 1998, before the Bankruptcy Appellate Panel, both the Debtor/Appellant and the Appellee agreed that were this exaction paid, the tax would have

Similarly, the Bankruptcy Court did not, and was not required to, look to section 6672 of the Internal Revenue Code to determine whether the assessment was a penalty. The evidence presented at the hearing was sufficient for the Bankruptcy Court to detect⁸ that, under paragraph 7(d) of the OIC, the assessment was a tax, and we agree with its decision.

CONCLUSION

We conclude that the Bankruptcy Court's findings, that incorporating the d/b/a did not relieve the Debtor of liability under the OIC, and that the civil assessment was a tax under paragraph 7(d) of the OIC, were not clearly erroneous. The judgment is affirmed.

been abated. This further lends credence to the Bankruptcy Court's decision that this civil assessment was a tax.

⁸ "What's in a name?" WILLIAM SHAKESPEARE, ROMEO AND JULIET act II, sc. 2.